No. 83-1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LACY H. THORNBURG, *et al.*,

Appellants,

v.

RALPH GINGLES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

SUPPLEMENTAL BRIEF FOR APPELLEES

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TABLE OF AUTHORITIES

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SUPPLEMENTAL BRIEF FOR APPELLEES

Appellees submit this Supplemental Brief in response to the brief filed by the United States.

The controlling question raised by the brief of the United States concerns the standard to be applied by this Court in reviewing appeals which present essentially factual issues. A section 2 action such as this requires the trial court to determine whether

> the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by [a protected group].[1]

The presence or absence of such equal opportunity, like the presence or absence of a discriminatory motive, is a factual question. See Hunter v. Underwood, ___ U.S. ___ (1985); Rogers v. Lodge, 458 U.S. 613 (1982). Correctly recognizing the factual nature of that issue, this Court has on two occasions during the

[1] 42 U.S.C. § 1973(b).

present term summarily affirmed appeals in section 2 actions. Strake v. Seamon, No. 83-1823 (Oct. 1, 1984); Brooks v. Allain, No. 83-1865 (Nov. 13, 1984). If an ordinary appeal presenting a disputed question of fact is now to be treated for that reason alone as presenting a "substantial question," then this case, and almost all direct appeals to this Court, will have to be set for full briefing and argument. We urge, however, that to routinely treat appeals regarding such factual disputes as presenting substantial questions would be inconsistent with Rule 52(a), Federal Rules of Civil Procedure, and with the efficient management of this Court's docket.

The Solicitor General, having conducted his own review of some portions of the record,[2] advises the Court that, had he

[2] The Solicitor General, understandably less

been the trial judge, he would have decided portions of the case differently. The judges who actually tried this case, all of them North Carolinians with long personal understanding of circumstances in that state, concluded that blacks were denied an equal opportunity to participate in the political processes in six North Carolina multi-member and one single member legislative districts. The Solicitor General, on the other hand, is of the opinion that there is a lack of

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familiar with the details of this case than the trial court, makes a number of inaccurate assertions about the record. The government asserts, for example, "there is not the slightest suggestion" that black candidates were elected because whites considered them "safe". (U.S. Br. 18 n. 17). In fact there was uncontradicted testimony that only blacks who were safe could be elected. (Tr. 625-26, 691, 851, 857). The Solicitor also asserts, incorrectly, (U.S. Br. 17 n.14) that the 1982 election was the only election under the plan in question. In fact, the districts have been the same since 1971. (J.S. App. 19a)

equal opportunity in 2 districts,[3] that "there may well be" a lack of opportunity in 2 other districts,[4] but that blacks in fact enjoy equal opportunity to participate in the political process in the three remaining districts.[5] Other Solicitors General might come to still different conclusions with regard to the political and racial realities in various portions of North Carolina.

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[3] House District 8 and Senate District 2; U.S. Brief 21.

[4] House District 36 and Senate District 22; U.S. Brief 20 n.10 The appendix to the jurisdictional statement which contains the District Court's opinion has a typographical error stating erroneously that two black citizens have run "successfully" for the Senate from Mecklenburg County. The correct word is "unsuccessfully". J.S. App. 34a.

[5] House Districts 21, 23 and 39; U.S. Brief 16.

The government's fact-bound and statistic-laden brief, noticeably devoid of any reference to Rule 52, sets out all of the evidence in this case which supported the position of the defendants. It omits, however, any reference to the substantial evidence which was relied on by the trial court in finding discrimination in the political processes in each of the seven districts in controversy.[6] The Senate Report accompanying section 2 listed seven primary factual factors that should be considered in a section 2 case and the government does not challenge the findings in the district court's opinion that at least six of those factors supported appellees' claims. On the contrary, the government candidly acknowledges "[t]he district court here faith-

[6] J.A. App. 21a-52a.

fully considered these objective factors, and there is no claim that its findings with respect to any of them were clearly erroneous." (U.S. Br. 11).

The government apparently contends that all the evidence of discrimination and inequality in the political process was outweighed, at least as to House Districts 21, 23 and 39, solely by the fact that blacks actually won some elections in those multi-member districts. It urges

> Judged simply on the basis of 'results,' the multimember plans in these districts have apparently enhanced -- not diluted -- minority strength. (U.S. Br. 16).

On the government's view, the only "result" which a court may consider is the number of blacks who won even the most recent election. Section 2, however, does not authorize a court to "judg[e] simply

on the basis of [election] 'results'", but requires a more penetrating inquiry into all evidence tending to demonstrate the presence or absence of inequality of opportunity in the political process.[7] Congress itself expressly emphasized in section 2 that the rate at which minorities had been elected was only "one circumstance which may be considered."

[7] The district court found, inter alia, that the use of racial appeals in elections has been widespread and persists to the present, J.S. App. 32a; the use of a majority vote requirement "exists as a continuing practical impediment to the opportunity of black voting minorities" to elect candidates of their choice, J.S. App. 30a; a substantial gap between black and white voter registration caused by past intentional discrimination; extreme racial polarization in voting patterns; and a black electorate more impoverished and less well educated than the white electorate and, therefore, less able to participate effectively in the more expensive multi-member district elections. There was also substantial, uncontradicted evidence that racial appeals were used in the 1982 Durham County congressional race and the then nascent 1984 election for U.S. Senate.

(Emphasis added). The legislative history of section 2 repeatedly makes clear that Congress intended that the courts were not to attach conclusive significance to the fact that some minorities had won elections under a challenged plan.[8]

The circumstances of this case illustrate the wisdom of Congress' decision to require courts to consider a wide range of circumstances in assessing whether blacks are afforded equal opportunity to participate in the political process. A number

[8] S. Rep. 97-417, 29 n.115 ("the election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote', in violation of this section"), n. 118. ("The failure of plaintiff to establish any particular factor is not rebuttal evidence of non-dilution"). See also S. Rep. at 2, 16, 21, 22, 27, 29, 33 and 34-35. The floor debates are replete with similar references. In addition, see White v. Regester, 412 U.S. 755 (1973) affirming Graves v. Barnes, 343 F. Supp. 704, 726, 732 (W.D. Texas 1972) (dilution present although record shows repeated election of minority candidates).

of the instances in which blacks had won elections occurred only after the commencement of this litigation, a circumstance which the trial court believed tainted their significance.[9] In several other elections the successful black candidates were unopposed.[10] In one example relied on by the Solicitor in which a black was elected in 1982, every one of the 11 black candidates for at-large elections in that county in the previous four years had been defeated.[11] In assessing the political opportunities afforded to black

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[9] J.A. App. 37a. See also, S. Rep.at 29 n.115, citing Zimmer v. McKeithen, 485 F.2d 1297, 1307 (5th Cir. 1973),(post-litigation success is insignificant because it "might be attributable to politicalsupport motivated by different considerations -- namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds.")

[10] J.S. App. 42a, 44a.

[11] J.S. App. 35a, 42a-43a.

voters under those at-large systems, the Solicitor General evidently disagrees with the comparative weight which the trial court gave to these election results and to the countervailing evidence; the assessment of that evidence, however, was a matter for the trial court.

The Solicitor General seeks, in the alternative, to portray his disagreement with the trial court's factual findings as involving some dispute of law. This he does by the simple expedient of accusing the district court of either dissembling or not knowing what it was doing. (U.S. Brief 12) Thus, despite the district court's repeated statements that section 2 requires only an equal opportunity to participate in the political process,[12] the Solicitor General insists that "the only

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[12] J.S. App. 12a, 15a, 29a n.23, 52a.

explanation for the district court's conclusion is that it erroneously equated the legal standard of Section 2 with one of guaranteed electoral success in proportion to the black percentage of the population." (U.S. Brief 12, emphasis original). Elsewhere, the Solicitor, although unable to cite any such holding by the trial court, asserts that the court must have been applying an unstated "proportional representation plus" standard. (U.S. Brief 18 n.18). The actual text of the district court opinion simply does not contain any of the legal holdings to which the Solicitor indicates he would object if they were some day contained in some other decision.

The government does not assert that the trial court's factual finding of racially polarized voting was erroneous, or discuss the extensive evidence on which

that finding was based. Rather, the government asserts that the trial court, although apparently justified in finding racially polarized voting on the record in this case, adopted an erroneous "definition" of racial bloc voting. (U.S. Br. 13). Nothing in the trial court's detailed analysis of racial voting patterns, however, purports to set any mechanical standard regarding what degree and frequency of racial polarization is necessary to support a section 2 claim. Nothing in that opinion supports the government's assertion that the trial court would have found racial polarization whenever less that 50% of white voters voted for a black candidate. In this case, over the course of some 53 elections, an average of over 81% of white voters refused to support any black candidate. (J.S. App. 40a). Prior to this

litigation there were almost no elections in which a black candidate got votes from as many as one-third of the white voters. (J.S. App. 41a-46a). In the five elections where a black candidate was unopposed, a majority of whites were so determined not to support a black that they voted for no one rather than vote for the black candidate. (J.S. App.44a). While the level of white resistance to black candidates was in other instances less extreme, the trial court was certainly justified in concluding that there was racial polarization, and the Solicitor General does not assert otherwise.

The Solicitor General urges this Court to note probable jurisdiction so that, laying aside the policy of appellate self-restraint announced in Pullman-Standard v. Swint, 456 U.S. 273 (1981), and its progeny, the Court can embark upon

its own inquiry into the diverse nuances of racial politics in Cabarrus, Forsyth, Wake, Wilson, Edgecombe, Nash, Durham, and Mecklenburg counties. Twice within the last month, however, this Court has emphatically admonished the courts of appeals against such undertakings. Anderson v. City of Bessemer City, ___ U.S. ___ (1985); Witt v. Wainwright, ___ U.S. ___ (1985). Twice in the present term this Court has summarily affirmed similar fact-bound appeals from district court decisions rejecting section 2 claims. Starke v. Seamon, No. 83-1823 (October 1, 1984); Brooks v. Allain, No. 83-1865 (Nov. 13, 1984). No different standard of review should be applied here merely because in this section 2 case the prevailing party happened to be the plaintiffs.

Appellees in this case did not seek, and the trial court did not require, any guarantee of proportional representation. Nor did proportional representation result from that court's order. Prior to this litigation only 4 of the 170 members of the North Carolina legislature were black; today there are still only 16 black members, less than 10%, a far smaller proportion than the 22.4% of the population who are black. Whites, who are 75.8% of the state population, still hold more than 90% of the seats in the legislature.

In the past this Court has frequently deferred to the views of the Attorney General with regard to the interpretation of section 5 of the Voting Rights Act. No such deference is warranted with respect to section 2. Although the Department of Justice in 1965 drafted and strongly supported enactment of section 5, the

Department in 1981 and 1982 led the opposition to the amendment of section 2, acquiescing in the adoption of that provision only after congressional approval was unavoidable. The Attorney General, although directly responsible for the administration of section 5, has no similar role in the enforcement of section 2. Where, as where, a voting rights claim turns primarily on a factual dispute, the decisions of this Court require that deference be paid to the judge or judges who heard the case, not to a Justice Department official, however well intentioned, who may have read some portion of the record. White v. Regester, 412 U.S. 755, 769 (1973). The views of the Department are entitled to even less weight when, as in this case, the Solicitor's present claim that at-large districts "enhance" the interests of minority

voters in North Carolina represents a complete reversal of the 1981 position of the Civil Rights Division that such districts in North Carolina "necessarily submerge[] cognizable minority population concentrations into larger white electorates." (Section 5 objection letter, Nov. 30, 1981, J.S. App. 6a).

CONCLUSION

For the above reason, the judgment of the district court should be summarily affirmed.

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During the early months of 1982, counsel for the General Assembly worked closely with the Civil Rights Division of the Department of Justice in order to remedy those aspects of the plans found objectionable under Section 5. In February, the General Assembly enacted new redistricting plans in which some county lines were broken in order to overcome the Attorney General's objection in the covered counties of the State. When these plans were submitted, the Attorney General found one problematic district in each plan. These subsequently were redrawn to Justice Department specifications. On April 30, 1982, the Senate and House plans received Section 5 preclearance.

The Plaintiffs' Claim

The action below remained pending during the course of these legislative proceedings, and several amendments to the complaint were permitted to accommodate the successive revisions of the redistricting plans. The last supplemental complaint included, as a basis of the plaintiffs' claim of vote dilution, Section 2 of the Voting Rights Act, as amended on June 29, 1982. In its final form, the complaint alleged that in 6 General Assembly districts, the use of multi-member configurations diluted the voting strength of black citizens in violation of Amended Section 2. In addition, the plaintiffs alleged that a concentration of black voters was split between 2 single-member Senate districts resulting in vote dilution. The class was certified as the class of all black residents of the State,[3] and

[3] Although the plaintiffs were certified as the class of all black voters in the state, their position was hardly one based on consensus. Four prominent black leaders testified for the State that

trial to a three-judge court was held for 8 days commencing July 25, 1983.

The plaintiffs attempted to prove that five multi-member House districts and 1 multi-member Senate district violated Section 2. These districts were:

House District No. 23—Durham County
House District No. 36—Mecklenburg County
Senate District No. 22—Mecklenburg and Cabarrus Counties
House District No. 39—Forsyth County
House District No. 21—Wake County
House District No. 8 –Nash, Wilson, and Edgecombe Counties

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blacks in the at-large districts had equal access to the process and three of them specifically stated that single-member legislative districts would hinder rather than help blacks politically. It became clear during the trial that much of the impetus for the challenge to the multi-member districting came from plaintiffs' counsel. Neither the Chairman of the House nor the Senate Reapportionment Committee had ever been contacted by the plaintiffs during the legislative process regarding the desire for single-member districts. R. 1065-66, 1975.

The extent of the artifice constructed by the plaintiffs is demonstrated by the following vignette. Two days before trial, the Mecklenburg Black Caucus passed a resolution supporting single-member districts. R. 1477-78. The resolution was handwritten by a partner in the firm representing the plaintiffs and delivered by him to the Caucus Chairman during the Caucus meeting. R. 1489. The issue was not on the agenda for the meeting and the members had no notice of the vote. R. 1484. The plaintiffs then called the Chairman of the Caucus as a witness at trial to introduce the resolution to support their contention that the black community was in agreement on the issue of single-member districts.

The plaintiffs also tried to show that Senate district 2, a single-member district was statutorily infirm because the district could have been drawn to create a 59% black majority. As drawn by the legislature and approved by the Attorney General, the district's population was 55.1% black.[4]

Political Participation and Electoral Success of Blacks in the Challenged Districts

The record reflects the following facts:

Durham County comprised a 3-member House district which had a black voting age population of 33.6%. Stip. 59.[5] Durham has had at least one black representative to the House continuously since 1973. Stip. 148. At the time of trial two of its five county commissioners, one of whom is Chairman, were black (Stip. 150), as were two of its four elected district court judges.[6] Stip. 153. The three-member Durham County Board of Elections had a black member from 1970 until 1981, when he was appointed to the State Board of Elections. Stip. 154. The chairmanship of the Durham County Democratic Party was held by a black from 1969 through 1979 and is held by a black for the 1983-85 term. Stip. 155. One single-member

[4] In order to draw a black majority Senate district in the Northeast portion of the State, as the U.S. Attorney General had instructed, it was necessary to divide many counties. The resulting Senate District 2 contains portions of Bertie, Chowan, Gates, Halifax, Northampton, Hertford, Martin and Washington Counties.

[5] The Stipulations of fact are contained in the Pre-trial Order. Citations are to the number assigned to the Stipulation.

[6] The facts here recited are from the record and so naturally reflect the electoral situation in 1983 at the time of trial.

House district with a black population of approximately 70% could be drawn within Durham County. Stip. 144.

In addition, the evidence shows that the Durham Committee on the Affairs of Black People is a powerful political organization which endorses and supports both black and white candidates for election. No candidate in Durham can expect to get many black votes without the endorsement of the Durham Committee. R. 1295.

The black voting age population of Mecklenburg is 24%. Stip. 59. One of the eight House members elected from Mecklenburg County in 1982 is black. Stip. 116. James D. Richardson, who is also black and was running in his first election for public office in 1982, came in ninth in a race for eight seats, with only 250 votes less than the eighth successful candidate. Stip. 116. This was in a field of 18 candidates. Pl.Ex. 14(d), R. 86, 112.[7] While there is currently no black senator from the Mecklenburg-Cabarrus County Senate District, James Polk, a first time candidate for public office, ran fifth in a race for four seats in the 1982 election. Stip. 118. The Mecklenburg-Cabarrus County Senate District did have a black senator for three terms from 1975 through 1980, until his death before the 1980 elections. Stip. 117. In addition, it was stipulated at the time of trial that one of the five Mecklenburg County Commissioners, Stip. 119, two of the nine Charlotte-Mecklenburg Board of Education members, Stip. 123, and one of the ten Mecklenburg County District Court judges, Stip. 122, all of whom are black.

[7] Plantiffs' Exhibits will be identified as Pl.Ex.; Defendants' Exhibits as Def.Ex.

were elected at-large. In addition, another black was appointed to a vacant district court judgeship in Mecklenburg County. Stip. 123.

At the time of trial a black served as the chairperson of the three member Mecklenburg County Board of Elections. Stip. 125. The Mecklenburg Board of Elections also had one black member in the years 1970 to 1974 and 1977 to the present. Stip. 125. The chair of the Mecklenburg County Democratic Executive committee at the time of trial and his immediate predecessor are also black. Stip. 126.

The City of Charlotte, located in Mecklenburg County, has a population which is 31% black. Stip. 127. Harvey Gantt, who is black, currently serves as Mayor of that city. J.S. 35a. Charlotte also has two black city council members elected from majority black districts. Stip. 128.

It was stipulated at the time of trial that if Mecklenburg County were subdivided, two single-member House districts each with a black population of 65% could be constructed. Stip. 110. If the Mecklenburg-Cabarrus Senate district were dismantled, one single member Senate district with a black population of 65% could be drawn. Stip. 112.

The five-member House District 39, including most of Forsyth County, has a 22% black voting age population. Stip. 54. Two black representatives were elected in the 1982 elections. Stip. 132. Forsyth County has previously elected a black representative for the 1975-76 and 1977-78 General Assemblies. Stip. 133. Blacks have also been appointed by the Governor on two occasions to represent Forsyth County in the North Carolina House. This occurred in 1977 when a black representative resigned, Stip. 134, and again in 1979

when a white representative resigned. Stip. 135. At the time of trial one of the five Forsyth County Commissioners, Stip. 136, and one of the eight Forsyth County School Board members were black. Stip. 139. Both the County Commission and the School Board are elected at-large. In addition, when the case went to trial the three-member Forsyth County Board of Elections had one black member, and that Board has had one black member every year since 1973. Stip. 141.

The City of Winston-Salem, located in Forsyth County, has a black population of slightly more than 40% and a black voter registration of slightly less than 32%. Stip. 142. The Winston-Salem City Council has eight members elected from wards. Stip. 143. At the time of trial, there were three black members elected from majority black wards and one black member elected from a ward with slightly less than 39% black voter registration. Stip. 143. This black councilman, Larry Womble, defeated a white Democratic incumbent in the primary and a white Republican in the general election in 1981. Stip. 143.

If Forsyth County were divided into single member House districts, one district with a population over 65% black could be formed. Stip. 129.

The current Wake County six member House delegation includes one black member, Dan Blue, who, at the time of trial, was serving his second term. Stip. 162. In the 1982 election, Blue received the highest vote total of the 15 Democrats running in the primary, Stip 162, and the second highest vote total of the 17 candidates running for the six seats in the general election. Stip. 162. Slightly more than 20% of Wake County's voting age population is black. Stip. 59.

Although no single-member black Senate district can be constructed in Wake County, Stip. 160, Wake elected a black Senator for the 1975-76 and 1977-78 terms. Stip. 163.

In July of 1983, one of the seven Wake County Commissioners was black, Stip. 164, as were two of the eight Wake County District Court Judges. Stip. 165. The Sheriff of Wake County, John Baker, is black and at the time of trial was serving his second term. Stip. 166. In the 1982 election for his second term, Baker received 63.5% of the votes in the general election over a white opponent. Stip. 166. In the Democratic Primary, Baker received over 63% of the vote, defeating two white opponents. Stip. 166. Wake County Commissioners, District Court Judges, and the Sheriff are all elected at large. Stip. 165, 166. Wake County has also had a black member continuously on its three-member Board of Elections since 1970, Stip. 169, and at the time of trial had a black chairman. Stip. 169.

The City of Raleigh in Wake County is 27.4% black. Stip. 171. Raleigh had a black mayor from 1973 to 1975, Stip. 172, and has had one black on its seven-member city council since 1973. Stip. 173.

Although it is not possible to draw a black majority single-member Senate district which is wholly within or includes substantial parts of Wake County, Stip. 161, John W. Winters, who is black, was elected Senator from Wake County for two terms, 1975 through 1978. Stip. 163.

If Wake County were subdivided into single-member House districts, one district with a population around 65% black could be created. Stip. 158.

House District 8 is comprised of three whole counties: Nash, Wilson and Edgecombe, all of which are covered by Section 5 of the Voting Rights Act. Stip. 174. The Attorney General approved this four-member at-large district. Stip. 45. Edgecombe County, which has a voting age population which is 46.7% black, Stip. 59, has a five-member Board of Commissioners elected at-large and when the case went to trial, two of its members were black. Stip. 176.

Senate district 2, a single-member district, is 55.1% black. Stip. 190. This district which lies in an area covered by Section 5, Stip. 190, was drawn according to Justice Department instructions to create a district having a population that was 55% black, regardless of how many county lines had to be crossed. Stip. 190. Consequently, Senate district 2, as it was approved by the Attorney General, Stip. 45, encompasses parts of Bertie, Chowan, Halifax, Hertford, Martin, Northhampton and Washington Counties. In the 2 election years before trial, black candidates had won 3 seats in the State House from areas within the borders of Senate district 2. In Gates County where 49% of the registered voters are black, a black is currently serving a term as Clerk of Court. Stip. 192. In Halifax, several blacks have been elected to the County Commission and the City Council of Roanoke Rapids. It is possible to draw a black district in the general area of Senate district 2 which is 59.4% black. Stip. 188.

The plaintiffs' own witnesses were convincing evidence of the openness of the political process in North Carolina. Their witnesses included Phyllis Lynch, the Chairperson of the Mecklenburg Board of Elections and a force in the County Black Caucus. R. 427. Sam

Reid, as the head of the Vote Task Force in Mecklenburg County, is a special Registration Commissioner appointed by the Mecklenburg County Board of Elections to respond to special requests to register citizens at civic, community and church gatherings. R. 470. Frank Ballance, the representative to the General Assembly from House District 7, is also Chairman of the Second Congressional District Black Caucus. R. 592. Larry Little is an alderman in the City of Winston-Salem. He is also Chairman of the City's Public Works Commission. R. 592. Willie Lovett, Chairman of the Durham Committee on the Affairs of Black People, R. 646, testified that the "impact and responsiveness in the community to the Durham Committee and its recommendations and programs is rather massive." R. 670. G. K. Butterfield, an attorney, organized the Wilson Committee on the Affairs of Black People and is also a gubernatorial appointee to the State Inmates Grievance Board. R. 695, 719, 936. Fred Belfield is President of the Nash County N.A.A.C.P. R. 737, 754. All of these plaintiffs' witnesses are black.

Voter Registration

In October of 1982, the State Board of Elections reported the following voter registration statistics for the challenged counties: Stip. 58.

	% White VAP Registered*	*% Black VAP Registered*
Durham	66.0	52.9
Forsyth	69.4	64.1
Mecklenburg	73.0	50.8

* Voting Age Population

	% White VAP Registered*	*% Black VAP Registered*
Wake	72.2	49.7
Nash	64.2	43.0
Wilson	64.2	48.0
Edgecombe	62.7	53.1
Bertie	76.6	60.0
Chowan	74.1	54.0
Gates	83.6	82.3
Halifax	67.3	55.3
Hartford	68.7	58.3
Martin	71.2	53.3
Northhampton	82.1	73.9
Washington	75.6	67.4

* Voting Age Population

Although black registration still lags behind white registration, the larger gains over the past several years have been among the black population. Def.Ex. 14, R. 505, 510. In the period 1980 to 1982, statewide registration among whites dropped by 112,000, while among blacks it increased by 12,096—as much as 50% in some counties. R. 585. This increase was largely due to an effort launched by the State Board of Elections in 1980 to increase voter registration in general, and in particular among groups traditionally underregistered. Since the publication of these registration figures, the General Assembly has passed legislation to further facilitate voter registration. R. 1335. Now public libraries offer voter registration during library hours. R. 1335-36. In addition, many public high schools now have a permanent voting registrar. R. 1335-36. The legislation further provides that branches of the Department of Motor Vehicles

offer voter registration so that the opportunity to register is available to everyone who comes in to renew or replace a driver's license or to conduct any other business. R. 1336.

Despite the great strides made by the State in eliminating any lingering effects of past electoral discrimination by facilitating and encouraging registration, and despite the considerable electoral success achieved by blacks in North Carolina, the district court found that the challenged districts violated Section 2. The court reached this untenable conclusion because it never uncovered the core value, the specific right, protected by the statute. Section 2 guarantees equal opportunity to participate in the political process. The court below, however, struck down the challenged districts because they did not guarantee electoral success.[8]

SUMMARY OF THE ARGUMENT

Section 2 of the Voting Rights Act as amended by Congress in 1982 guarantees equal access to the political process. The focus of the provision is opportunity, not guaranteed results. Congress incorporated the analysis and specific language of *White* v. *Regester*, 412 U.S. 755 (1973) into the amended statute. Thus a violation of Section 2 is established when plaintiffs demonstrate that the political processes lead-

[8] Apparently the court adopted this conclusion of the plaintiffs' expert, Bernard Grofmann:

> My fifth general conclusion is as follows: Even though a constituency has elected a black candidate in the past, this does not provide a guarantee that it will do so in the future, especially if the black incumbent who is the present occupant of that position does not run in the future in subsequent races.

ing to nomination and election are not equally open to participation by the racial minority group.

The record below shows that blacks in North Carolina enjoy active and meaningful participation in politics. This is evidenced by the fact that out of 11 black candidates who ran for election to the General Assembly in 1982, from the districts challenged by the plaintiffs, 7 were elected.

The district court erred in equating access with guaranteed electoral success. This runs counter to the legislative history of Section 2, and the judicial precedents which Congress explicitly invoked.

The district court found that racial bloc voting exists whenever less than 50 percent of the whites vote for a black candidate. This is an arbitrary definition which has no relationship to real politics or electoral outcomes. By virtue of this definition the court found "severe" racial polarization in elections in which the black candidate received 40% of the white vote *and* won the election. Racial bloc voting has legal significance only when it operates to prevent black candidates from being elected to office.

ARGUMENT

Introduction

On June 29, 1982 Congress enacted amendments to the Voting Rights Act of 1965. Foremost among the changes adopted was a complete transformation of Section 2. Prior to this 1982 amendment, Section 2 had been viewed as simply the statutory restatement of the Fifteenth Amendment. *City of Mobile* v. *Bolden*, 446 U.S. 55 (1981). Consistent with this Court's rulings in such cases as *Washington* v. *Davis*,

426 U.S. 229 (1976) and *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), it was necessary to prove both disparate impact and discriminatory intent in order to establish a violation of the Fifteenth Amendment and consequently, of Section 2. This was the holding of the plurality of the Court in *City of Mobile, supra.*

Congress amended Section 2 to eliminate the intent standard imposed by *Mobile.* Section 2(a) as amended provides that no voting law shall be imposed or applied in a manner which *results* in a denial or abridgement of the right to vote on account of color. Subsection (b) in its entirety reads:

> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the state or political subdivision is one "circumstance" which may be considered, provided that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. 42 U.S.C. § 1973.

The language of Section 2 is clear—the statute is intended to afford to minority citizens the opportunity to meaningfully participate in the political process. It explicitly disavows any guarantee of electoral success or proportional representation.

The legislative history supports a reading of Section 2 which focuses on equal access. On October 15, 1981, the House of Representatives passed H.R. 3112 which transformed Section 2 into a results test. The House version read as follows:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color or in contravention of the guarantees set forth in Section 4(f)(2). The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.

The Senate Judiciary Subcommittee on the Constitution rejected the proposed amendment and recommended the retention of the existing statutory language. Report of the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 2d Sess., Report on S. 1992. Although many members of the Senate Judiciary Committee supported the House language, there were not enough votes to report the House version to the floor. 128 Cong. Rec. S. 6920 (daily ed. June 17, 1982) (statement of Sen. Hatch). Senator Dole avoided a stalemate by constructing a compromise that allowed a majority of the Judiciary Committee to agree upon a bill. 128 Cong. Rec. S. 6964 (daily ed. June 17, 1982) (statement of Sen. Kennedy).

The Dole compromise, the bill ultimately adopted by Congress, incorporates language from the land-

mark vote dilution case, *White* v. *Regester,* 412 U.S. 755 (1973). In *White* the Court wrote:

> The plaintiff's burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice. 412 U.S. at 766.

Senator Dole made it clear that, just as in *White* v. *Regester,* the touchstone of the new Section 2 would be equal access and opportunity. S. Rep. No. 417, 97th Cong., 2d Sess. at 193. [hereinafter S. Rep.] On the floor of the Senate, in answer to Senator Thurmond's question as to whether the focus of the amended statute would be on election results or equal access to the process, Senator Dole responded, "[t]he focus of Section 2 is on equal access, as it should be." 128 Cong. Rec. S. 6962 (daily ed. June 17, 1982) (statement of Sen. Dole). He also explained in his views included in the Senate Report that, "[c]itizens of all races are entitled to have an equal chance of electing candidates of their choice, but if they are fairly afforded that opportunity and lose, the law should offer no remedies." S. Rep. at 193.

The Senate Report echoes the view of Senator Dole that the amendment was intended to codify the equal access standard of *White* v. *Regester,* S. Rep. at 22-24. Indeed the Senate Report explicitly states that the substitute amendment "codifies the holding in *White,* thus making clear the legislative intent to incorporate that precedent and the extensive case law which developed around it into the application of Section 2." S. Rep. at 32.

The district court erred in failing to apply Section 2 in a manner consistent with the judicial precedents expressly identified by Congress. Although the court acknowledged Congress' reliance on *White* v. *Regester,* it did not seriously attempt to integrate the language of Section 2 with the case law which Congress sought to codify. Inasmuch as the language of subsection (b) came directly from this Court's opinion in *White,* it is obvious that the statute must be construed in light of this precedent. Because the district court attempted to interpret the amended provision without this essential judicial background, it reached several erroneous conclusions of law. The court's fundamental misconception was that Section 2 creates an affirmative entitlement to proportional representation. Building on this foundation, the court was able to make a finding of vote dilution even though it was evident that black residents of the challenged districts had the same opportunity as whites to participate in the political process and to elect candidates of their choice.

I. Section 2 of the Voting Rights Act does not entitle protected minorities, in a jurisdiction in which minorities actively participate in the political process and in which minority candidates win elections, to safe electoral districts simply because a minority concentration exists sufficient to create such a district.

The district court erred in equating a violation of Section 2 with the absence of guaranteed proportional representation. The Court flatly stated:

> The essence of racial vote dilution in the *White* v. *Regester* sense is this: that primarily because of the interaction of substantial and persistent racial polarization in voting patterns with a chal-

> lenged electoral mechanism, a racial minority with distinctive group interests that are capable of aid or amelioration by government is effectively denied the political power to further those interests that numbers alone would presumptively give it in a voting constituency not racially polarized in its voting behavior. (citation omitted). J.S. at 14a.

This statement epitomizes the district court's reading of the amended statute. Although blacks had achieved considerable success in winning state legislative seats in the challenged districts, their failure to consistently attain the number of seats *that numbers alone would presumptively give them,* (i.e., in proportion to their presence in the population) the court found that Section 2 had been violated. All of the vote dilution cases following *White* run counter to this interpretation. In *David* v. *Garrison,* for example, the Fifth Circuit wrote that "dilution occurs when the minority voters have no real opportunity to participate in the political process." 553 F.2d 923, 927 (5th Cir. 1977). And in *Dove* v. *Moore,* the Eighth Circuit in discussing vote dilution under the pre-Mobile constitutional standard now codified in Section 2, stated that the "constitutional touchstone is whether the system is open to full minority participation not whether proportional representation is in fact, achieved." 539 F.2d 1152, 1154 (8th Cir. 1976).

Moreover, the court's understanding of vote dilution runs contrary to specific instruction in the legislative history. The Senate Report explained that some opponents of the results test had suggested that it would enable a plaintiff to win a vote dilution suit by showing an at-large election scheme, underrepresentation of minorities, and a mere scintilla of other evidence.

This is essentially the same standard enunciated by the district court, and the Senate Report states that "this position is simply wrong." S. Rep. at 33.

In addition, the court failed to understand the disclaimer at the end of subsection (b). The statute states that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973. The district court interpreted this to mean only that lack of proportional representation in and of itself does not constitute a violation of Section 2. J.S. at 15a, n.13. Once again, the Senate Report specifically disavows the interpretation adopted by the court. The Report states that the House version simply assured that a failure to achieve proportional representation in and of itself would not constitute a violation. S. Rep. at n.225. The Senate strengthened the House language to make it explicit that the amended section creates no affirmative right to proportional representation. S. Rep. at 68.

Subsection (b) of the amended statute states that a finding of discriminatory results should be based on the totality of circumstances. The Senate Report elaborates on this by supplying a list of factors which the Committee suggested might be indicative of vote dilution. S. Rep. at 28.[9] These factors were culled from

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[9] The Senate Report criteria are as follows:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

footnote continued on next page

the analytical framework in *White* and also from *Zimmer* v. *McKeithen,* 485 F.2d 1297 (5th Cir. 1974), a Fifth Circuit case which followed and applied *White.*

The proper application of the analysis suggested by the Senate Report, and the purpose of Section 2 generally, are best examined in light of *White* and *City of Mobile* v. *Bolden,* 446 U.S. 55 (1981). The facts of *Mobile,* the case to which Congress adversely reacted, and those of *White,* which set the standard that Congress wished to codify, provide the background necessary to apply the amended statute. Com-

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3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group.

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

parisons of the record in this case with the findings of the district courts in *White* and *Mobile* make it clear that Section 2 was never intended to reach the circumstances of the case at bar.

In *White* v. *Regester* the Court upheld the district court's order to dismantle multimember districts in Dallas and Bexar Counties in Texas. While the *White* Court recognized that multimember districts might be used invidiously to minimize the electoral strength of racial minorities, it also stressed that to sustain such a claim "it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential." 412 U.S. at 766.

The record in *White* however, showed that the counties in which the Plaintiffs challenged the at-large system had the following characteristics: 1) a history of official racial discrimination, which continued to touch the right of blacks to register, vote and to participate; 2) a majority vote requirement in party primaries; 3) a place rule which reduced multimember elections to a head-to-head contest for each position; 4) only 2 blacks elected to the Texas legislature since Reconstruction; 5) a slating system which excluded minorities; 6) a white dominated organization which controlled the Democratic party and which did not need or solicit black support; 7) a consistent use of racial campaign appeals by the Democratic party. The district court concluded and the Supreme Court agreed that the net result of these factors was to shut racial minorities out of the electoral process.

Likewise in *Mobile,* the plaintiffs attacked the at-large method of electing the city commissioners, 428

F.Supp. 384 (S.D. Ala. 1977). The district court, applying the test used in *Zimmer* v. *McKeithen,* 485 F.2d 1297 (5th Cir. 1973), found that the electoral system there was marked by a majority vote requirement in both the primary and general elections, numbered posts, and no residency requirement. In addition, in a city whose population was 35.4% black, no black person had ever been elected to the Board of Commissioners because of acute racial polarization in voting. The Court found further that the city officials had made no effort to bring blacks into the mainstream of the social and cultural life by appointing them to city boards and committees in anything more than token numbers. The plaintiffs also marshalled evidence of police brutality towards blacks, mock lynchings and failure of elected officials to take action in matters of vital concern to black people. On appeal to the Fifth Circuit, the Court noted that the plaintiffs had prevailed on each and every *Zimmer* factor, 571 F.2d 238, 244 (5th Cir. 1978).

The record in the present case differs dramatically from the pictures drawn in *White* and *Mobile*. Multimember districts in North Carolina simply do not operate to exclude blacks from the political process as they did in those cases. The degree of success at the polls enjoyed by black North Carolinians is sufficient in itself to distinguish this case from *White* and *Mobile* and to entirely discredit the plaintiffs' theory that the present legislative districts deny blacks equal access to the political process.

The court below reviewed the evidence by discussing essentially the same factors considered in *White* and *Mobile*. Contrary to the court's conclusion, however, no matter how one weights and weighs the evidence presented, it does not add up to denial of equal access to the political forum.

A. History of official discrimination which touched the right to vote.

The plaintiffs introduced evidence, not refuted by the State, that North Carolina had in the past prevented blacks from actively participating in the democratic process. Stips. 85-94; R. 224-324. This evidence, however, is relevant only if these past impediments to political participation have a perceptible impact on the ability of blacks to involve themselves effectively in the democratic processes of North Carolina today. *See Major* v. *Treen,* 574 F.Supp. 325, 65 (E.D. La. 1983). In *Hendrix* v. *Joseph,* 559 F.2d 1265 (5th Cir. 1977) the court warned that because no area in the South was free of past discrimination in voting, the *present* effects of such discrimination must be carefully assessed. "The factual question is," the court wrote, "whether that discrimination precludes effective participation in the electoral system by blacks *today* in such a way that it can be remedied by a change in the electoral system." 559 F.2d at 1270. (emphasis added).

The record in this case shows that the drive to engage blacks in the electoral process in North Carolina began before the passage of the Voting Rights Act in 1965. R. 1178-79, 1306-07. In Mecklenburg and Wake Counties, for example, voter registration drives aimed particularly at increasing black registration began before that date. *Id.* Over the past years, the State Board of Elections has redoubled its

efforts to reach those groups in the State that are relatively underregistered, especially blacks. The Board of Election's most recent campaign included a comprehensive educational program to encourage interest in voting, and new legislation designed to maximize access to registration. Def.Ex. 1-9, 11-15, R. 500-06, 510. At the close of the books prior to the 1982 General elections, the Board's drive had resulted in a 17% increase in registration among blacks. Def. Ex. 14, R. 506, 510. By the adjournment of the 1983 Session, the General Assembly had enacted new legislation providing for more registrars, more registration locations and generally easier access to registration. R. 1335. In spite of these facts, the district court still counted this factor against the defendants because the percentage of eligible blacks registered is lower than the percentage of eligible whites registered.

Although total registration among blacks is still lower than among whites, blacks are registering at a faster rate today than are whites. It is obvious from this statistic alone that no barriers or impediments to registration presently exist. In addition, the mere fact that in the 7 challenged districts, 7 blacks were elected to the General Assembly in 1982 demonstrates that there are no lingering effects of past discrimination.[10]

The Senate Report does not purport to cast in stone the definitive inflexible list of relevant factors to be

[10] The successful black candidates were Dan Blue (Wake County); Annie Kennedy, C. B. Hauser (Forsyth County); Phil Berry (Mecklenburg County); Frank Ballance (Warren County); Kenneth Spaulding (Durham County); C. Melvin Creecy (Northhampton County).

considered in Section 2 cases. The factors are meant to be exemplary of the types of evidence which might be relevant, and the relevance of any given item may vary from case to case. *Boykins* v. *City of Hattiesburg,* No. H77-0062(c) (S.D. Miss. March 7, 1984), at 8. In this instance, this first factor is not particularly relevant, largely because the State's effort to overcome the effects of past electoral discrimination have been so successful. The mere existence of impediments to the exercise of the franchise by minorities at some time in the past should not "in the manner of original sin" continue to be accounted against the State long after the barriers have been removed and the residual consequences ameliorated.

B. The extent to which voting is racially polarized.

Because courts have generally considered this to be the pivotal factor in Section 2 analysis, this topic is discussed below in detail. Suffice it to say here that the court found "severe" racial polarization in every election in which less than a majority of whites voted for the black candidate—even where the black won and white candidates also received less than a majority of the white vote.

C. The majority vote requirement.

North Carolina has a majority vote requirement in primary elections only. Stip. 88, 89. The district court found that no black had ever lost a bid for election to the General Assembly because of the majority vote requirement.[11] J.S. 30a. Nonetheless, the court also

[11] Because the one-party nature of the state greatly inflates the importance of victory in the Democratic primary, there is little

found that the majority vote requirement contributed to the dilution of the black vote. Here again, the Court mechanistically counted one of the Senate Report factors against the State without seriously considering the actual impact on electoral access. If no black candidacy has ever been impeded by the majority vote requirement, it is absurd to consider the requirement a circumstance contributing to vote dilution.

D. The socio-economic effects of discrimination and political participation.

This criterion from the Senate Report must be read fully and in conjunction with its accompanying footnote 114. The Report states that a court may examine "the extent to which members of the minority group in the state or political subdivision bear the *effects of discrimination* in such areas as education, employment and health, *which hinder* their ability to participate effectively in the political process." S. Rep. at 29. (emphasis added). Thus, a plaintiff may properly introduce evidence, for example, of inferior health care, education, and income among black citizens. The relevance of this highly prejudicial evidence, however, is contingent upon proof that the level of participation by blacks in the political process is depressed.

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support for eliminating the majority vote requirement. In fact, a bill introduced in the General Assembly in 1983 by Rep. Spaulding, who is black, would have merely reduced the requirement to 40 percent. Stip. 90. Interestingly, a study superimposing Rep. Spaulding's proposal on all legislative elections back to 1964 shows that no additional blacks would have won as a result of this change. R. 960-64.

Note 114 confirms this reading. There, Congress expressed its intent that a plaintiff need not prove a causal nexus between disparate socio-economic status and depressed political activity. However, social and economic circumstances have no relevancy at all to the issue of vote dilution if participation by the group claiming dilution is not in fact depressed. Note 114 does not relieve the plaintiffs of proving depressed political participation, it merely relieves them of proving the nexus between the two circumstances.

The court seems to have interpreted this factor and Note 114 to say that evidence of inferior economic and social status is proof of depressed levels of participation in the democratic process. The plaintiffs did indeed offer evidence that blacks fared less well than whites on several socio-economic measures. Stip. 62-84. A witness offered as an expert in political sociology then testified that the lower one's economic status the less likely one is to participate in the political process. R. 402.

Nothing in the record, however, supports the finding that participation by blacks in the electoral process of North Carolina is depressed. Rather, the whole record reflects vigorous participation by blacks in every aspect of political activity. First of all, nearly every one of the plaintiffs' own witnesses recited a series of Democratic party offices, elective offices and appointed political positions in which they had served. See 11-12 *supra*. The activities of just this small group of people cast some doubts on any claim of either depressed participation or unequal opportunity. Witnesses for the plaintiffs also testified about successful volunteer efforts by black leaders and civic groups to

increase voter registration. R. 463-64, 470. This too is hardly reflective of a politically inactive black community. Furthermore, the power wielded by such organizations as the Durham Committee on the Affairs of Black People, R. 670, 1295, the Mecklenburg Black Caucus, R. 453-55, the Raleigh-Wake Citizens Association, R. 1333, the Black Women's Political Caucus, R. 1333, and the Wake County Democratic Black Caucus, R. 1333-34, evidence a vital and sophisticated black organization. Since the plaintiffs failed to prove that political participation on the part of blacks in North Carolina was depressed or in any way hindered, the evidence of disparate economic and social status was not particularly relevant to the issue of whether the challenged legislative districts dilute black voting strength and the court should have rejected this evidence.

E. Racial appeals in political campaigns.

The court found that from Reconstruction to the present racial appeals had been "effectively used by persons, either candidates or their supporters, as a means of influencing voters in North Carolina political campaigns." J.S. 31a. The court apparently accepted the opinions of plaintiffs' expert, Paul Luebke, on this topic.[12] The Court lists 6 elections in which these appeals supposedly were made:

[12] Dr. Luebke's testimony was simply not credible. For example, Luebke insisted that campaign slogans such as "Eddie Knox will serve all the people of Charlotte," and "Knox can unify this city," were racial slurs. R. 345. Most damaging to his credibility, however, was his adamant refusal to admit that what might be a racial appeal in the mind of one person could *never* be a fair political comment in the mind of another. R. 417.

1950 Campaign for U.S. Senate
1954 Campaign for U.S. Senate
1960 Campaign for Governor
1968 Campaign for President
1972 Campaign for U.S. Senate
1984 Campaign for U.S. Senate

Of these 6 campaigns, 4 of them occurred more than 15 years ago. One more dates from more than 10 years ago. Only one of the so-called racial appeals cited by the court occurred recently and it did not occur in the context of an election to the General Assembly in any one of the challenged districts. Furthermore, the court's findings were based on Dr. Luebke's opinions unsupported by any systematic analysis or study. The same type of commentary on racial appeals by a plaintiff's expert has been dismissed by a district court as "pure sophistry." *Overton* v. *City of Austin,* No. A-84-CA-189 (N.D. Tex. March 12, 1985) at 26. The court in *Overton* found the methodology totally wanting because the expert had not interviewed a statistically reliable sample of voters to determine if *they* perceived any racial inferences in the campaign materials labelled "racial appeals" by the expert. *Id.* at 27. Dr. Luebke's research consisted of reading the ads and determining

Dr. Luebke insisted, for example, that the white candidates for the Durham County Board of Commissioners made racial appeals throughout their campaign in 1980. R. 350-356. Luebke found the slogan, "Vote for Continued Progress," to be racially offensive. R. 353-54. Nonetheless, two of the five seats in that election were won by blacks and the 5 Commissioners then elected one of the blacks Chairman of the County Board. R. 422-25.

whether they contained coded or "telegraphed" racial messages. He interviewed no one to substantiate his conclusions. R. 418-19.

F. The extent to which blacks have been elected.

Despite the considerable electoral success of blacks in the challenged districts, the court found that "[t]he overall results achieved to date at all levels of elective office are minimal in relation to the percentage of blacks in the population." J.S. at 37a.[13] This conclusion is simply inapposite to the issue of whether blacks enjoy equal political opportunity in the challenged districts. In the 1982 elections, in the districts in question, 11 black candidates offered for election. Nine won in the Democratic primaries and seven went on to win in the general elections. Three of the four candidates who lost were running for public office for the first time. The fourth losing candidate, Howard Clement, testified that he lost because he did not have the endorsement of the Durham Committee on the Affairs of Black People, R. 1295, and indeed, he received only a small percentage of the black vote. The results of the 1982 legislative elections are hardly consistent with a finding of "minimal" electoral success.

G. Responsiveness.

The plaintiffs offered no evidence of unresponsiveness but on cross-examination their witnesses conceded that their legislators were responsive to their

[13] From the Court's recitation of statistics at J.S. 33a, it is clear that this conclusion is based on the percentage of blacks elected *statewide*, not in the challenged districts.

needs.[14] R. 450-53. The defendants showed and the court found that the effort to increase black registration was directly responsive to the needs of the black community. J.S. 25a. In addition, the court specifically noted that the State has appointed a significant number of black citizens to judgeships and to influential executive positions in state government. J.S. at 47a. Despite the plethora of evidence offered by the defendants, the court did not find that legislators generally were responsive *or* unresponsive, and they did not examine the effect of this factor on vote dilution. The failure to make such an assessment reflects the court's underlying assumption that effective representation of the minority community demands guaranteed election of minority candidates. Apparently, the court interpreted "of their choice" to mean "of their race." But there is simply no right, constitutional or statutory, to elect representatives of one's own race. *Seamon* v. *Upham*, Civil No. P-81-49-CA (E.D. Tex. Jan. 30, 1984). *See also Overton* v. *City of Austin*, No. A-84-CA-189 (W.D. Tex. March 12, 1985). Responsiveness is probative of the existence of access to the political process because a white representative who responds to his black constituency is just as effective, vis a vis the black community, as a black person.

[14] In the legislative session immediately preceding the trial, the General Assembly greatly increased the availability of voter registration. R. 1335. In addition, the budget included an allocation for sickle cell anemia research, a holiday honoring Dr. Martin Luther King was established, and local legislation changing the method of election to the Wake County School Board from a district to an at-large system was passed at the urging of black leaders from Wake County. R. 1333-38.

In its discussion of polarized voting in *Rogers* v. *Lodge,* 458 U.S. 613 (1982), the Supreme Court noted that when a racial majority can win all the seats in an at-large election without the support of the minority, it is possible for those elected to ignore the views and needs of the minority with impunity. 458 U.S. at 616. When this occurs, the members of the minority are essentially excluded from the democratic process because they have no representative voice. It is this very potential to shut blacks out of the process without fear of political consequences which makes unresponsiveness of elected officials one of the indicia of a Section 2 violation. In the present case blacks are not excluded from the process by unresponsive white representatives. White candidates need black support to win, and many black political organizations regularly endorse white candidates. R. 454-55, 464-65, 638, 855, 1234-36. Consequently white officeholders are held accountable by the black community. Under these circumstances, the responsiveness of the members of the General Assembly to the black citizenry further evidences the effective participation of blacks in the political processes of North Carolina.

H. Legitimate state policy behind county-based representation.

The court found that the use of the whole counties as the building blocks of legislative districting was "well-established historically, had legitimate functional purposes, and was in its origins completely without racial implications." J.S. at 50a. The court, however, found this evidence irrelevant on the grounds that the legislature could have contradicted established policy to avoid dilution of the black vote.

The court's analysis completely contorts the purpose for the presence of this factor in the Senate Report. Evidence of a consistently applied, long-standing non-racial policy weighs against a finding of vote dilution. As the Senate Report notes, a finding on behalf of the State on this factor would not *alone* negate other strong indications of dilution. Nonetheless, the court's basic finding refutes any suggestion that the use of whole counties as the basic unit of districting was racially motivated.

Based on the totality of circumstances, it is difficult to comprehend how the court concluded that blacks in North Carolina have less opportunity than whites to participate in the political process and to elect candidates of their choice. The court's opinion seems to turn upon its belief that although the evidence proved that blacks could be elected, there was no guarantee that blacks always would be elected from the districts at issue.

Apparently the court thought that guaranteed access required guaranteed victory in as many single-member "safe" seats as could be drawn. The decision removes black voters and candidates from the competitive electoral arena and protects them from the vagaries of political fortune. Certainly Section 2 does not require this.

II. Racially polarized voting is not established as a matter of law whenever less than a majority of white voters vote for a black candidate.

The district court identified racial bloc voting as the "single most powerful factor in causing racial vote dilution." J.S. 47a. In light of this emphasis,

it was essential to apply the proper legal definition of racial bloc voting. The court, however, accepted the opinion of the plaintiffs' expert that racially polarized voting occurs whenever less than 50% of the white voters cast a ballot for the black candidate.[15] As a result, the court concluded that there was "severe and persistent" racial bloc voting despite the following facts:

a) In the 1982 Mecklenburg House primary, Berry who is black received 50% of the white vote and Richardson who is also black, received 39%. Berry received more votes than any other candidate. R. 189. Both black candidates won the primary. R. 188-89; Pl.Ex. 14(c), R. 85, 112.

b) In the 1982 House general election for Mecklenberg County, 42% of the white voters voted for Berry; 29% of the whites voted for Richardson. Pl. Ex. 14(d), R. 86, 112. In a field of 18 candidates for 8 seats, 11 white candidates received fewer white votes than Berry. *Id.* In that election Berry finished second, and Richardson finished ninth, only 250 votes behind the eighth place winner.

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[15] The plaintiffs' expert, Bernard Grofmann, expressed his definition of racial polarization in several ways. Basically, he opined that racially polarized voting occurs when white voters and black voters vote differently from one another. R. 50. Racial polarization is substantively significant when the outcome would be different if the election were held among only the black voters as compared to only the white voters. R. 159. Thus a black candidate who would be the choice of the black voters would have to get a majority of the white vote to win in the hypothetical all-white constituency. Thus Dr. Grofmann's definition of substantively significant racially polarized voting can be reduced to this: it occurs whenever less than a majority of the white voters vote for the black candidate. R. 161.

c) In the 1982 House general election for Durham County, black candidate Spaulding received 47% of the white vote and won the election. R. 183-84, Pl.Ex. 16(e), R. 85, 112.

d) In the 1982 House primary election for Durham County, one black candidate, Clement, received 32% of the black vote and 26% of the white vote. R. 181-82; Pl.Ex. 16(d), R. 86, 112. The black candidate Spaulding received 90% of the black vote and 37% of the white vote. *Id.* Of the two black candidates, only Spaulding was successful in the primary. *Id.* Had the black voters wanted to elect Clement, they could have cast doubleshot votes. R. 184.

e) In the 1982 Senate primary election for Mecklenburg County, the black candidate, Polk, received 32% of the white vote and was successful in the primary. Pl.Ex. 13(j), R. 86, 112.

f) In the 1982 Mecklenburg Senate general election, Polk, a black candidate received 33% of the white vote. The leading white candidate received 59% of the white vote. Pl.Ex. 13(k), R. 86, 112.

g) In the 1982 Forsyth House primary, the two black candidates, Hauser and Kennedy, received 25% and 36%, respectively, of the vote. Pl.Ex. 15(e), R. 86, 112. In a field of 11, Kennedy received more white votes than six of those candidates. Pl.Ex. 15(e), R. 86, 112. Both black candidates won the primary. *Id.*

h) In the 1982 House general election for Forsyth County, Hauser and Kennedy received 42% and 46% respectively, of the white vote. R. 175-76; Pl.Ex. 15 (f), R. 86, 112. The successful white candidates received substantially equal support from black and

white voters—all within a range between 43% and 63%. Both black candidates were successful. *Id.*

i) In the 1982 House primary election for Wake County, a six-member district, the only black candidate running, Dan Blue, received more total votes than any other of the 15 candidates. R. 194-95; Pl.Ex. 17(d), R. 86, 112. Blue received more white votes than 11 of the other candidates. *Id.*

j) In the 1982 House general election for Wake County, Blue ran second out of a field of 17 candidates. R. 195, Pl.Ex. 17(e), R. 86, 112. Blue also received the second highest number of white votes. R. 196; Pl.Ex. 17(e), R. 86, 112.

k) Although there have been relatively few black republican candidates, and they have not been successful, these candidates have always received a greater number of white votes than black votes. Pl. Ex. 16(f), R. 86, 112.

l) Finally, of the 11 elected black incumbents who have sought reelection to the General Assembly in recent years, all 11 have won reelection.[18] R. 178.

The court's conclusion that these facts establish polarized voting simply flies in the face of common sense. In 1982 legislative elections in Durham, Forsyth, Mecklenburg and Wake Counties, all of the black candidates received between 25 and 50% of the white vote. Of 8 Black Democratic candidates in these counties, 5 were elected. These results do not "approach any realistic legal standard of polarized voting." *Jones* v. *City of Lubbock*, 730 F.2d 233 (5th Cir. 1984) (reh'g en banc denied).

[18] The court incorrectly found that "some black incumbents were reelected . . ." J.S. at 40a. Plaintiffs' own expert testified that all black incumbents who had offered for reelection had been successful. R. 178.

In *Terrazas* v. *Clements*, 537 F.Supp. 514 (N.D. Tex. 1984), for example, the Court found that where 35% of the whites voted for the minority candidate, there was no racial polarization. Similarly, in *Collins* v. *City of Norfolk*, No. 83-526-N (E.D. Va. July 19, 1984), the district court determined that in 3 elections where 32, 31 and 26% respectively, of the whites had voted for a black candidate, there was no legally significant racial polarization, *Collins* at 25.

The definition of racial bloc voting adopted by the court suffers from both conceptual and methodological deficiencies. Whatever merits Dr. Grofmann's definition may have as a theoretical construct it has very little to offer to an analysis of a real political contest where the objective of any candidate, regardless of race, is to win. Grofmann considers racial polarization "substantively significant" when less than 50% of the white voters vote for the black candidate. R. 81. In terms of political reality, this is a wholly arbitrary distinction. Racially polarized voting is significant ("politically," "substantively," "statistically," or otherwise) when the black candidate does not receive enough white support to win the election.

A candidate is primarily concerned with receiving more votes than his opponents, not with the color of the person who votes for him. Discrete and different voting patterns among racial groups concern the candidate when they operate to prevent him from winning. This political reality lies at the root of Congress' inclusion of polarized voting in Section 2

analyses. The mere presence of different voting patterns in the white and black electorate does not prove anything one way or the other about vote dilution. What is probative of vote dilution is voting along racial lines which shuts the minority group out of the process by consistently defeating the candidate of its choice. *Rogers* v. *Lodge,* 458 U.S. 613, 616 (1982). In *Rogers,* this Court described polarization in terms of its capacity to effect actual election outcomes:

> Voting along racial lines allows those elected to ignore black interests without fear of political consequences and without bloc voting the minority candidates would not lose elections solely because of their race. 102 S.Ct. at 3731.

In *NAACP* v. *Gadsden County School Board,* 691 F.2d 978 (11th Cir. 1982), the court quoted the language from *Rogers* as a guide to gaging polarized voting in Gadsden County elections. The court found that black candidates had lost elections solely because of their race. In a county in which blacks comprised 48.5% of the registered voters and in which 14 blacks had run for office since 1972, only 1 black had been elected. Voting by whites along racial lines had prevented blacks from winning elections.

Similarly, in *McMillan* v. *Escambia County, Florida,* 688 F.2d 960 (5th Cir. 1982) no black had ever served on the County Commission elected at-large. The Court of Appeals noted that "it is sensible in this case at is was in *Lodge* to expect that at least some blacks would be elected absent racial polarized voting." 688 F.2d 960, 966 at n.14. Here again, the court viewed racial bloc voting as probative of the

issue of vote dilution insofar as it excluded blacks from winning elections, and this is its proper legal application. Nothing in the record in this case indicates that racial bloc voting has prevented black candidates from obtaining elective office.

The methodology upon which Dr. Grofmann based his analysis is severely flawed. He analyzed 53 elections using both extreme case analysis and the ecological regression model. In extreme case analysis, those precincts which are nearly all white or all black are examined. For instance if a precinct is 95% white, and a black candidate receives 50% of the votes in that precinct, one can surmise that approximately 50% of the whites voted for the black candidate. This method has limited applicability because of the small number of homogeneous precincts. Regression analysis uses a computer program to compare the proportion of the vote received by black and white candidates in each precinct with the proportion of black and white voters in each precinct.

One fundamental problem with regression analyses is what is called the "ecological fallacy,"—the use of aggregate data to explain individual behavior. Dr. Grofmann did not use turn out figures, but rather compared the registered voters' by race with the election returns for each precinct. This fallaciously assumes that the turnout on any given election day, whether it be 10% or 90% of the voters, exactly mirrors the racial make-up of the voter rolls for that precinct.

The more critical problem is that both extreme case analysis and regression analysis show nothing more than raw correspondence between the percentage of votes for the black candidate and the percentage of

blacks living in a particular precinct. If there is a correlation between these two variables which has statistical significance, then the analyst concludes that race is determining election outcomes. R. 219. But unless the expert has tested variables other than race, he cannot know that race correlates better than, or even as well as, party affiliation, age, religion, income incumbency, education, campaign expenditures, or any other factor that could have influenced the election. R. 1387-89.

Regression analysis, as used by Dr. Grofmann and accepted by the court, increasingly has come under attack because it fails to account for the influence of variables other than race. The model systemically infers, by correlating only two variables—race of the candidate and racial composition of a precinct—that race is the only explanation for the correspondence between the variables.[17] As Judge Higginbotham noted in his concurrence in *Jones* v. *Lubbock,* "it ignores

[17] See *McClefkey* v. *Zant,* 580 F.Supp. 338 (N.D. Ga. 1984), in which the district court provides an exhaustive critique of the regression model. "[T]he regression equation can produce endless series of self-fulfilling prophecies because it always attempts to explain actual outcomes based on whatever variables it is given." *Id.* at 370.

Dr. Grofmann virtually admitted this when he explained why he considered no other factors in his analysis: "[R]acial polarization as I have defined it deals with the voting patterns of white voters versus the voting patterns of black voters. Therefore, I look at the voting patterns of white voters versus the voting patterns of black voters to determine racial polarization." R. 177.

Grofmann also testified that race was the *cause* of the differences in voting patterns. He stated: "[W]hen black voters consistently rank black candidates one and two in their preference ordering and white voters consistently rank black candidates at the bottom . . . in a society which has a history of racial discrimination and

the reality that race . . . may mask a host of other explanatory variables." 730 F.2d 233 (5th Cir. 1984) (reh'g. en banc denied.)

In *Lee County Branch of the NAACP* v. *City of Opelika,* 748 F.2d 1473 (5th Cir. 1973) the Fifth Circuit panel agreed that a court should not place too much reliance on regression analysis in ruling on the issue of racially polarized voting. The court underscored the importance of a multiple variable analysis to establish the true role of race in determining election outcomes. Likewise, in *Terrazas* v. *Clements,* 581 F.Supp. 1329 (N.D. Tex. 1984) the district court rejected the analysis of the plaintiffs' expert because he failed to measure the impact of more than one variable. *See also, Overton* v. *City of Austin,* No. A-84-CA-189 (W.D. Tex. March 12, 1985) (district court adopted the opinion of Judge Higginbotham and rejected plaintiff's conclusions based on regression); *Collins* v. *City of Norfolk,* Civil No. 83-526-N (E.D. Va. July 19, 1984) (court rejected plaintiff's analysis because it did not consider "factors other than race which may greatly influence voting behavior.") at 21.

The district court inadvertently makes a case against the conclusions drawn by Dr. Grofmann. At the outset the court states that vote dilution occurs when racial bloc voting interacts with an electoral mechanism, such as at-large elections, to deny proportional representation to a racial minority group which has "distinctive group interests." J.S. at 14a.

in which there is clear racial polarization, . . . the most plausible explanation is that race is determining the elections." R. 219.

This is tantamount to saying, there is racial polarization because there is racial polarization.

It is reasonable for people to vote for candidates who represent their interests. And if the political and governmental interests of any group are truly distinctive, alignment of interests might explain differences in voting patterns more cogently than race. Regression analyses as employed by Dr. Grofmann simply cannot account for non-racial factors. In fact, it cannot even establish whether any factor is more important than race in determining election outcomes.

Although the legislative history of amended Section 2 does not discuss racial bloc voting in detail, it does give some indication that Congress was concerned with polarization in voting that effectively locks the racial minority out of the political forum. The Subcommittee on the Constitution criticized the results test on the grounds that it *assumed* that race was the "predominant determinant" of voting preferences. Subcommittee Rep. at 41-44. The Subcommittee noted, that contrary to this assumption, in many jurisdictions racial bloc voting is not monolithic and indeed black candidates enjoy substantial white support. *Id.* The Senate Judiciary Committee responded to this criticism by emphasizing that, in those communities where black candidates do receive substantial white support, "it would be exceedingly difficult for plaintiffs to show that they were effectively excluded from fair access to the political process." S. Rep. at 33.

In explaining the reach of the results test, the House Report stated, that "[i]t would be illegal for an at-large election scheme for a particular state or local body to permit a bloc voting majority over a substantial period of time consistently to defeat minority candidates." H. Rep. at 30. The facts in this case do not even approach the situation contemplated by the House Report.

The plaintiffs in this case have not demonstrated that bloc voting by whites has deprived them of political access *or* electoral success. Black candidates for the General Assembly in 1982 received substantial white support, in many instances more than 40% of the white vote. The record shows that between 1970 and 1982, 27 Black democrats ran in general elections for the General Assembly. Of these, 18 won. R. 147; Pl.Ex. 19, R. 112, 115. Two-thirds of all black candidates have been successful. This is hardly consistent with voting patterns which shut minorities out of the process.

The district court emphasized that "the demonstrable unwillingness of substantial numbers of the racial majority" to vote for black candidates is the "linchpin" of vote dilution. J.S. at 14-15a. The court, however, accepted the theoretical construct of plaintiffs' expert witness and failed to see the simple truth: a substantial number of whites do vote for black candidates; or the more compelling truth: the number of whites willing to vote for black candidates is so substantial, that black candidates win.

CONCLUSION

For the reasons stated herein, the decision of the United States District Court below should be reversed.

Respectfully submitted,

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